SUPREME COURT, U. S.

JAN 28 1975

IN THE

Supreme Court of the United States

———— TERM, 1975

No. 74-933

SECOND NATIONAL BANK OF NORTH MIAMI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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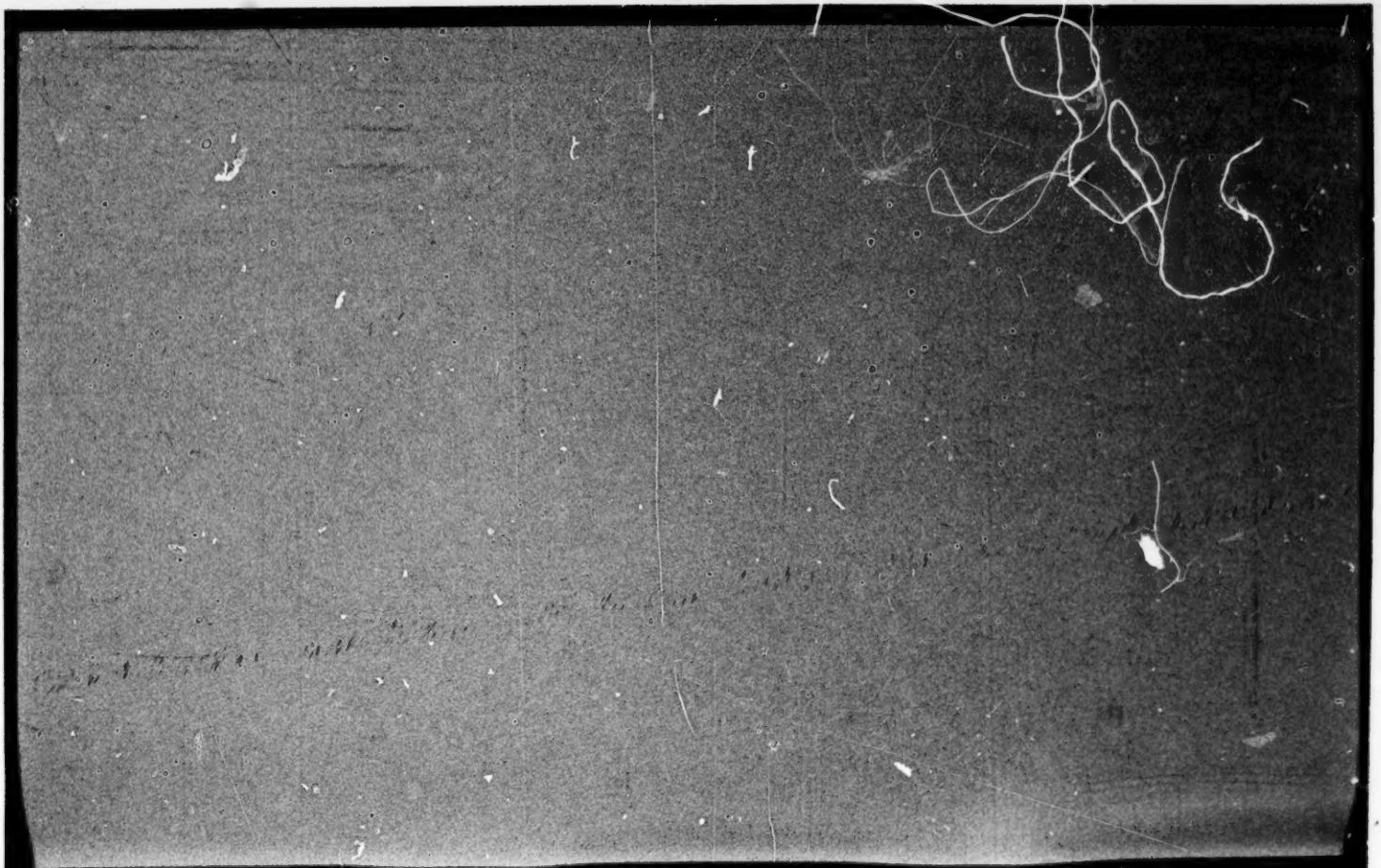

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	(ii)
ABBREVIATIONS USED IN PETITION	(ii)
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	11
POINT I	12
POINT II	14
POINT III	18
POINT IV	21
APPENDIX TO PETITION	
FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES	1a
SECTION 6311, 1954 INTERNAL REVENUE CODE	2a
SECTION 673.3-302, FLORIDA STATUTES	3a
SECTION 673.3-407, FLORIDA STATUTES	4a
OPINION OF COURT OF APPEALS (FIFTH CIRCUIT)	5a
JUDGMENT OF COURT OF APPEALS (FIFTH CIRCUIT)	36a
DENIAL OF PETITION FOR REHEARING	38a
RECALL AND STAY OF MANDATE	39a
LETTER OF COURT OF APPEALS ON MANDATE RECALL	41a

TABLE OF CITATIONS

Cases:	Page
American Tobacco Co. vs. *South Carolina National Bank*, 15 F.Supp. 215 (E.D. S.C. 1936)	21
Baumgartner vs. *United States*, 322 U.S. 665, 670 (1944)	14
Commissioner of Internal Revenue vs. *Lo Bue*, 351 U.S. 244 (1956)	22
Dale vs. Jennings, 107 So. 175 (Fla. 1925)	19, 20
Deal vs. *Migoski*, 122 So.2d 415 (Fla. 3d Dist. Ct. App. 1960)	19
Deseret Apartments, Inc. vs. *U.S.*, 250 F.2d 457 (10th Cir. 1957)	18
Ehrlich vs. *U.S.*, 252 F.2d 772 (5th Cir. 1958)	18
Gables Racing Assoc., Inc. vs. *Persky*, 6 So.2d 257 (Fla. 1940)	19
Leesburg vs. *Knight*, 164 So.2d 547 (Fla. 2d Dist. Ct. App. 1964)	20
Pan-American Petroleum & Transport Co. vs. *United States*, 273 U.S. 456, 506 (1926)	18
Peters vs. *Brown*, 55 So.2d 334 (Fla. 1951)	20
Sahler vs. *Sahler*, 17 So.2d 105 (Fla. 1944)	19
Schmitt vs. *Bethea*, 82 So. 817 (Fla. 1919)	19

OTHER AUTHORITIES:

Fifth Amendment to the Constitution of the United States of America	12
Section 6311(b)(2) of the 1954 Internal Revenue Code	11, 12, 13, 21, 22
Section 673.3-302 Florida Statutes	15
Section 673.3-407 Florida Statutes	22

ABBREVIATIONS USED IN PETITION:

App.—Appendix to this Petition for Writ of Certiorari

C.A. App.—Appendix filed with the Court of Appeals for the Fifth Circuit in connection with Appeal in this cause

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SECOND NATIONAL BANK OF NORTH MIAMI,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, THE SECOND NATIONAL BANK OF NORTH MIAMI, by and through its undersigned attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered October 4, 1974; petition for rehearing denied on October 31, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 502 F.2d 535 (1974).

While no formal opinion was rendered by the United States District Court for the Southern District of Florida and is therefore not reported, that portion of the tran-

script of trial comprising the findings of fact and conclusions of law of the United States District Court for the Southern District of Florida commences at page 207 of the Appendix filed with the United States Court of Appeals for the Fifth Circuit in connection with Petitioners' appeal to that court.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 4, 1974; petition for re-hearing denied on October 31, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. DID THE COURT BELOW ERR IN HOLDING THAT PETITIONER WAS NOT DENIED DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, IN THE APPLICATION OF SECTION 6311 (b) (2) OF THE 1954 INTERNAL REVENUE CODE UNDER THE FACTS OF THIS CASE, WHERE THE BANK MONEY ORDERS UPON WHICH SUIT WAS BROUGHT BY THE UNITED STATES WERE PROCURED BY AGENTS OF THE INTERNAL REVENUE SERVICE THROUGH PARTICIPATION IN A FRAUD UPON PETITIONER.

II. DID THE COURT BELOW ERR IN TREATING AS ESSENTIALLY FACTUAL, AND THEREFORE CONCLUSIVE UNLESS CLEARLY ERRONEOUS, THE DISTRICT COURT'S DETERMINATION THAT THE UNITED STATES WAS A HOLDER IN DUE COURSE OF THE BANK MONEY ORDERS, WHERE: (a) THE PRE-TRIAL STIPULATION PROVIDED THAT THE HOLDER IN DUE COURSE ISSUE WAS A MIXED QUESTION OF FACT AND LAW; (b)

THE CONDUCT OF THE INTERNAL REVENUE SERVICE AGENTS IN PROCURING THE BANK MONEY ORDERS DISTURBED THE TRIAL JUDGE; (c) THE COURT OF APPEALS ACKNOWLEDGED THAT CERTAIN EVIDENCE SUPPORTS PETITIONER'S DEFENSIVE THEORIES; AND (d) DETERMINATION THAT THE UNITED STATES IS A HOLDER IN DUE COURSE OF BANK MONEY ORDERS IS A SUMMARY CHARACTERIZATION OF COMPLICATED FACTUAL AND LEGAL MATTERS AND NOT THE KIND OF "FACT" TO WHICH CONCLUSIVENESS SHOULD ATTACH IN AN APPELLATE COURT.

III. DID THE COURT BELOW ERR IN FAILING TO APPLY THE EQUITABLE "CLEAN HANDS" DOCTRINE TO THE UNITED STATES, WHERE THE UNITED STATES SOUGHT EQUITABLE RELIEF IN THE FORECLOSURE OF A LIEN UPON THE GENERAL ASSETS OF PETITIONER BANK FOR FAILURE TO PAY UPON MONEY ORDERS OBTAINED FROM PETITIONER BY WAY OF CONCEALMENT AND MISREPRESENTATION INDUCED BY INTERNAL REVENUE SERVICE AGENTS.

IV. DID THE COURT BELOW ERR IN GIVING TOO BROAD AN INTERPRETATION OF SECTION 6311 OF THE 1954 INTERNAL REVENUE CODE, SO AS TO PROVIDE FOR A LIEN UPON THE GENERAL ASSETS OF PETITIONER BANK WHERE (a) PETITIONER BANK NEVER ACTUALLY RECEIVED THE FUNDS FOR WHICH THE MONEY ORDERS WERE ISSUED, (b) THE MONEY ORDERS WERE OBTAINED FROM PETITIONER BANK BY WAY OF CONCEALMENT AND MISREPRESENTATION INDUCED BY AGENTS OF THE INTERNAL REVENUE SERVICE, AND (c) THE MONEY ORDERS WERE NOT DRAWN IN PAYMENT OF INTERNAL

REVENUE TAXES, BUT INSTEAD WERE COMPLETED BY THE INTERNAL REVENUE SERVICE OTHERWISE THAN AS AUTHORIZED UNDER FLORIDA UNIFORM COMMERCIAL CODE SECTION 673.3-407.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the United States Constitution (App. 1a) Section 6311(b)(2) of the 1954 Internal Revenue Code (App. 2a) Section 673.3-302 Florida Statutes (App. 3a) Section 673.3-407 Florida Statutes (App. 4a).

STATEMENT OF THE CASE

Respondent, THE UNITED STATES OF AMERICA, filed suit in the United States District Court, Southern District of Florida, on January 5, 1972, seeking to foreclose a claimed lien on the general assets of the petitioner bank, predicated on the petitioner's issuance of One Hundred Ninety (190) money orders in the amount of Ninety-two Thousand Three Hundred Fifty-five Dollars and 86/100 ($92,355.86) received in part payment of the Internal Revenue taxes of a person other than petitioner, and which money orders were not paid upon presentation to the petitioner.

The basis for federal jurisdiction in the United States District Court was pursuant to 28 U.S.C. Sections 1340 and 1345; 62 Stat. 982; 28 U.S.C. Sections 1346(b) and Sections 2671 et. seq., and Sections 7401 and 7402 of the Internal Revenue Code of 1954.

For the Court's reference, there follows a listing of the persons involved and the fact circumstances giving rise to this law suit:

The Hannan Company—the general contractor in the construction of the Midway Mall Shopping Center, Dade

County, Florida. The Hannan Company will hereinafter be referred to as "HANNAN."

Medallion Electric Co., Inc.—the electrical sub-contractor working under a contract with HANNAN to furnish the electrical work in the construction of the Midway Mall Shopping Center. Medallion Electric Co., Inc. is hereinafter referred to as "MEDALLION" and its then Secretary-Treasurer and principal stockholder, Leonard Gutkin, will be referred to as "GUTKIN."

The Second National Bank of North Miami—hereinafter referred to as "BANK" or "petitioner," was the BANK at which MEDALLION maintained regular and payroll accounts. It was against a check deposited to the payroll account of MEDALLION in the BANK (but which check was never collected by the BANK) that the BANK issued the 190 personal money orders in question, and it is the delinquent tax indebtedness of MEDALLION (not the BANK) which the respondent seeks to satisfy through these proceedings.

Internal Revenue Service—hereinafter referred to as "IRS." The employees of IRS most immediately involved in the collection of MEDALLION's tax indebtedness and in the fact circumstances underlying this lawsuit are Mr. J. E. Hancock and Mr. Roger Cabal, hereinafter referred to respectively as "HANCOCK" and "CABAL."

The following facts were in effect, stipulated to by counsel for respondent and petitioner in their pretrial stipulation (C.A. App. 69-79), and at the time of trial (C.A. App. 106, 108-109, 131, 166).

MEDALLION, the electrical sub-contractor working under a contract with HANNAN, the general contractor, in the construction of the Midway Mall Shopping Center, had existing tax obligations to the United States. In this connection, MEDALLION, through its President, GUT-

KIN, and others, together with MEDALLION's attorney, Alphonse M. Schwitalla, Esquire, had held conferences with the Collection Division of IRS in Dade County, Florida, and in particular with HANCOCK and CABAL (C.A. App. 127-128, 148, 70). The BANK was unaware of the existing tax obligations of MEDALLION, though HANNAN may have been aware of them.

Prior to the issuance by the BANK of the 190 personal money orders in litigation on October 14, 1970, the BANK had at the request of HANNAN and MEDALLION previously issued money orders in the same form and manner and delivered them to MEDALLION on or about October 5, 1970 (C.A. App. 70). Such money orders issued the week earlier are not in dispute. Both with regard to the issuance of personal money orders on October 5, and October 14, 1970, the BANK prepared such personal money orders against the deposit of checks in the equivalent amount to the payroll account of MEDALLION maintained at the BANK. In the week of October 14, 1970, the sum of approximately $9,434.61 was also deposited to MEDALLION's payroll account by wire transfer. Each of the weeks referred to, the money orders, being 190 in number, were prepared from a schedule furnished by MEDALLION to the BANK and which schedule was a photostatic copy from the payroll ledger of MEDALLION (C.A. App. 126-127, 147, 447-450). The schedule provided the weekly wages of each electrician in MEDALLION's employ, but did not furnish the name of the electrician. For this reason, and because it is customary for personal money orders to be issued in such manner, the personal money orders bore the amount of each electrician's wages, but did not bear the name of any payee. The money orders were, however, issued for the specific purpose of paying MEDALLION's electricians on the Midway Mall job (C.A. App. 116, 71), and, with reference to the issuance of money orders on or about October 14th, HANNAN issued its check

made payable to Medallion Electric Co., Inc. and The Second National Bank of North Miami (C.A. App. 456-458), and HANNAN further had its representative on the BANK's premises together with GUTKIN, to insure that the check issued by HANNAN was deposited only to the *payroll* account of MEDALLION (C.A. App. 117). Thereafter, the money orders were drawn with the understanding and purpose that the 190 personal money orders were to be issued to MEDALLION's electricians on or about October 14th, as they had been the prior week when drawn in the same manner (C.A. App. 140-151, 71).

On October 13, 1970, MEDALLION, through GUTKIN and others, and through its attorneys, disclosed to IRS that MEDALLION had previously received the issuance of personal money orders from the BANK for the purpose of paying electricians on the Midway Mall job, but issued without a named payee, although bearing the amount on each money order of the electrician's wages and that MEDALLION anticipated a further such issuance of money orders for the same purpose and to be issued in the same manner (C.A. App. 106, 149-151, 70, 464). It should be noted that the BANK is not nor has it ever been delinquent in taxes to the United States, and the basis for the respondent's claim is not an existing tax liability of the BANK, but is predicated only upon delinquent tax liabilities of MEDALLION (C.A. App. 72).

Following the issuance of the first set of 190 personal money orders on or about October 5, 1970, which personal orders are not in contention in this lawsuit, HANNAN issued its corporate check made payable to both the BANK and MEDALLION, with the object of having MEDALLION's electricians on the Midway Mall job paid out of the proceeds of the deposit (C.A. App. 116, 70-71, 457-458). The BANK deposited to MEDALLION's pay-

roll account the mentioned HANNAN check and thereupon issued the 190 personal money orders bearing the amounts of wages owed to each electrician for payroll, but without a named payee, and delivered such 190 personal money orders to MEDALLION (C.A. App. 70-71). The purpose of the issuance of the money orders was for the payment of electricians on the Midway Mall job. The personal money orders were prepared from a listing furnished to the BANK by MEDALLION reflecting only amounts but not the names of the individual electricians (C.A. App. 126-127, 133-134, 451-454). Consequently, the purpose of the HANNAN deposit and the issuance of the 190 personal money orders was solely and specifically to be used in payment of the electricians employed by MEDALLION on the Midway Mall job (C.A. App. 132-133, 70-71).

Notwithstanding the purpose of the HANNAN deposit and the issuance of the personal money orders, MEDALLION delivered the personal money orders to IRS (C.A. App. 133-134, 139, 154, 160, 177), and IRS, after itself inserting in the place for payee the name of the Internal Revenue Service, commenced processing the personal money orders for deposit and application to the tax liability of MEDALLION (C.A. App. 71).

The BANK had issued its personal money orders upon telephone *verification* that HANNAN had funds sufficient in The City National Bank to cover the check deposited to the MEDALLION payroll account, but had issued the personal money orders prior to the actual *collection* of such funds (C.A. App. 71). When HANNAN learned of the unintended use to which the personal money orders had been put (by MEDALLION's seeking to use the money orders not to pay its electricians but to reduce MEDALLION's own tax liabilities), HANNAN stopped payment on the check it had drawn to the BANK and MEDALLION and which had been deposited to the

MEDALLION payroll account (C.A. App. 71). When the BANK received notice of this, and not having collected funds to cover the issuance of the personal money orders, the BANK also in turn stopped payment upon the personal money orders and immediately gave notice to the Collection Division of IRS in Dade County, Florida, and in Chamblee, Georgia, by telephone and telegram that it had so stopped payment. At the time of such notification, the personal money orders had not, on the information and belief of the BANK, been deposited by IRS (C.A. App. 71-72).

The IRS, through agents HANCOCK and CABAL, was aware that such personal money orders had been issued in the prior week by the BANK in the amounts of the individual electricians' wages, but with payee blank (C.A. App. 70). IRS was further aware that the issuance of the money orders intended for on or about October 14, 1970, was also for the weekly payroll of electricians by MEDALLION (C.A. App. 106, 149-151, 154-155, 70, 464). Neither MEDALLION nor IRS, however, apprised the BANK that such money orders, issued with the understanding of HANNAN and the BANK that the same would be used for the payment of the electricians' weekly payroll, would, instead, be submitted by MEDALLION to IRS with the object of reducing MEDALLION's outstanding tax liabilities (C.A. App. 134, 72).

While the above facts were, in effect, stipulated to in the pretrial stipulation and during the course of the trial proceedings, the main factual issue for determination at trial was *not* stipulated to. That is, whether respondent, through its agents in the Internal Revenue Service, did induce, instruct or require MEDALLION to obtain the 190 personal money orders from the BANK and turn them over to the IRS, knowing that the 190 personal money orders were to be issued for payroll, and this was accomplished with the respondent's cooperation and assistance.

With regard to this remaining and unstipulated to factual question, the record reflects that at a meeting with the IRS on October 13, 1970, prior to the issuance of the 190 personal money orders by the BANK, MEDALLION was induced, instructed and required by HANCOCK and CABAL, acting on behalf of the IRS, to obtain and deliver to the IRS the 190 personal money orders which are the subject of this suit, and that it was upon such inducement, instruction and requirement that MEDALLION obtained the money orders from the BANK and delivered them to the IRS (C.A. App. 133-134, 139, 154, 160, 177).

The trial commenced and concluded on February 7, 1973, before the United States District Court for the Southern District of Florida sitting without a jury with the trial court making findings of fact and conclusions of law at the end of the trial (C.A. App. 207-221) and thereafter on February 16, 1973, entering supplemental findings and conclusions of law (C.A. App. 80-82).

The trial court entered judgment on February 27, 1973, granting to the respondent a lien upon all of the assets of the petitioner, and ordering payment of the amount of $92,355.86, together with interest and costs to the respondent within ten (10) days or the appointment of a receiver and subsequent sale of the petitioner's assets to satisfy the lien. The judgment of February 27, 1973 also denied the petitioner's counter-claim (C.A. App. 83-84).

The Petitioner appealed the judgment of the United States District Court to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court on October 4, 1974, and denied re-hearing on October 31, 1974.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because (1) it erroneously holds that the petitioner was not denied due process of law as guaranteed by the Fifth Amendment of the Constitution through the application of Section 6311(b)(2) of the 1954 Internal Revenue Code under the facts of this case (2) it erroneously treated as essentially factual, and therefore conclusive unless clearly erroneous, the District Court's determination of holder in due course status for the United States (3) it erroneously fails to apply the equitable "clean hands" doctrine to the United States, and (4) it provides for too broad an interpretation of Section 6311 of the 1954 Internal Revenue Code. These errors, it is respectfully submitted, relate to questions of federal law decided in a way in conflict with applicable decisions of this Court, with the decisions of another Court of Appeals on the same matter and have so far departed from the accepted and usual course of judicial proceedings or have so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision. These errors will be discussed separately in the above stated order.

I

THE COURT ERRED IN HOLDING THAT PETITIONER WAS NOT DENIED DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THE APPLICATION OF SECTION 6311 (b)(2) OF THE 1954 INTERNAL REVENUE CODE UNDER THE FACTS OF THIS CASE WHERE THE BANK MONEY ORDERS UPON WHICH SUIT WAS BROUGHT BY THE UNITED STATES WERE PROCURED BY AGENTS OF THE INTERNAL REVENUE SERVICE THROUGH PARTICIPATION IN A FRAUD UPON PETITIONER.

The application of a statute may be unconstitutional for two reasons, first because the statute as drawn violates the constitution, and, second, because the statute, though constitutionally drawn, may be unconstitutionally applied. While the BANK did not seek in its appeal to the United States District Court for the First Circuit to question the constitutionality of Section 6311 of the Internal Revenue Code of 1954 as applied to an appropriate situation, it was urged that application of Section 6311 to the BANK, under the circumstances of this case, would be an unconstitutional application of Section 6311, resulting in a taking of the BANK's property without due process of law in violation of the Fifth Amendment to the United States Constitution.

In effect, the respondent has sought to use Section 6311 not as a device to maintain the preferential position of the United States as against general creditors under circumstances where the BANK had actually obtained and retained fund against which the remittance was made and drawn in payment of Internal Revenue taxes, but rather as a trap which the IRS, acting in concert with MEDALLION, had helped to bait, and having taken in the BANK, IRS has sought to extract from the BANK monies which the BANK itself had never received.

The Court of Appeals saw nothing unusual or impermissible in the use of Section 6311 to create a lien upon the BANK's assets in the event the money orders were not duly honored, the Court considering this to be "no more than a decision to trace the taxpayer's assets."

However, in the case before the Court it is clear that the BANK at no time came into possession of the assets of the taxpayer (MEDALLION) since the BANK never received the funds from the deposit of HANNAN'S check, against which the money orders were issued. And, those very money orders which were issued by the BANK solely and specifically to be used in payment of the electricians employed by MEDALLION, were obtained from the BANK by concealment and misrepresentation practiced upon the BANK on the inducement and instruction of the IRS.

Petitioner suggests that in as much as the fraudulent inducement which caused it to issue the money orders was made at the instruction and direction of the IRS, respondent should not now be allowed to benefit by the application of Section 6311 which would result in a taking not of the property of the taxpayer but of the petitioner BANK.

II

THE COURT ERRED IN TREATING AS ESSENTIALLY FACTUAL, AND THEREFORE CONCLUSIVE UNLESS CLEARLY ERRONEOUS, THE DISTRICT COURT'S DETERMINATION THAT THE UNITED STATES WAS A HOLDER IN DUE COURSE OF THE BANK MONEY ORDERS, WHERE: (a) THE PRE-TRIAL STIPULATION PROVIDES THAT THE HOLDER IN DUE COURSE ISSUE WAS A MIXED QUESTION OF FACT AND LAW; (b) THE CONDUCT OF THE INTERNAL REVENUE SERVICE AGENTS IN PROCURING THE BANK MONEY ORDERS DISTURBED THE TRIAL JUDGE; (c) THE COURT OF APPEALS ACKNOWLEDGED THAT CERTAIN EVIDENCE SUPPORTS PETITIONER'S DEFENSIVE THEORIES, AND (d) DETERMINATION THAT THE UNITED STATES IS A HOLDER IN DUE COURSE OF BANK MONEY ORDERS IS A SUMMARY CHARACTERIZATION OF COMPLICATED FACTUAL AND LEGAL MATTERS AND NOT THE KIND OF "FACT" TO WHICH CONCLUSIVENESS SHOULD ATTACH IN AN APPELLATE COURT.

Despite the fact that the pre-trial stipulation between the Petitioner and respondent provided that the question of whether the respondent was a holder in due course of the 190 personal money orders issued by Petitioner was a mixed question of fact and law, and despite the fact that the trial judge himself was disturbed by the actions of the Internal Revenue Service agents, as noted by the Court below, and that the Court of Appeals itself conceded that certain evidence supports the Petitioner's defensive theories, yet the District Court of Appeals treated the "holder in due course" determination as essentially factual and nonreversible unless clearly erroneous.

In the case of *Baumgartner* vs. *United States of America*, 322 U.S. 665, 670, this Court noted that while the concurrent findings of two lower courts are persuasive

proof in support of their judgments, that the phrase "finding of fact" may be a summary characterization of complicated factors of varying significance for judgment, and that such a "finding of fact" may be the ultimate judgment on a mass of details and the conclusion that may appropriately be drawn from the whole mass of evidence is not always the acertainment of the kind of "fact" that precludes consideration by the Supreme Court.

In order for the IRS to be holder in due course of the 190 personal money orders, it must under Section 673.3-302 Florida Statutes have taken the 190 personal money orders in good faith and without notice of any defense against or claim to it on the part of any person.

The trial court never addressed itself specifically to the questions of good faith and notice of defenses which go to the very requirements of being a holder in due course.

The reason for the distress of the trial judge over the morality of the actions taken by the Internal Revenue agents is understandable in the light of the testimony of MEDALLION's secretary-treasurer and principal stockholder, Leonard Gutkin, and MEDALLION'S attorney, Alphonse M. Schwitalla:

(From the testimony of LEONARD GUTKIN at C.A. App. 133-134, 139)

> "QUESTION: Did you, at that time, after so advising the representatives of the Internal Revenue Service, receive any instructions or orders or directions regarding these money orders?
>
> ANSWER: Yes.
>
> QUESTION: From whom did you receive them and what was said to you, sir?
>
> ANSWER: From whom exactly, I don't know. I think it's in the deposition.

QUESTION: Is it one of those gentlemen outside here?

ANSWER: I believe so, yes. We were instructed to turn over all monies, accounts receivables, and anything we received, to the Internal Revenue.

* * * *

QUESTION: When you received the money orders —when MEDALLION received the money orders, did you, at that time, intend to turn them over to the Internal Revenue Service?

ANSWER: Yes; that is what we were instructed to do.

* * * *

THE COURT: . . . We want to know whether you interpreted what they said to you as an order or a suggestion or whatever, to bring the money orders down there.

THE WITNESS: I considered it an order, more or less. If they said, 'Bring the money orders down,' I brought them down there."

(From the testimony of ALPHONSE SCHWITALLA —attorney for MEDALLION at C.A. App. 154-155)

"QUESTION: Having read that, Mr. Schwitalla, I would like to know whether Mr. Hancock, on behalf of the IRS, instructed you to the effect that the minute you got those money orders to bring them down; to go pick them up and bring them down to the IRS.

ANSWER: I can only repeat again what I said. We told them what the situation was and he said to go pick them up and bring them down there. That's right.

Just what I said on those depositions is true. Mr. Hancock is the one we spoke to, along with Mr. Cable; but Mr. Hancock, as I said there, was the superior present and he said, 'Go get them, then. If

that is the case, go get them and bring them down here.'

So we went and got them and brought them down.

QUESTION: This was after you had told the IRS the procedure and Hannan's purpose for which those money orders were to be issued; is that correct?

ANSWER: We explained to them the procedure that had been followed the previous week and the procedure we expected that was going to be followed that week.

Naturally, that procedure disclosed, as you say, Hannan's purpose for which the deposit was going to be made.

QUESTION: That procedure included furnishing to the bank a listing of 190 individual electricians or employees wages; is that correct?

ANSWER: That procedure included Medallion furnishing to the bank a list of some 183 or 190 individual amounts which were to be the net pay to Medallion employees for the week."

The testimony cited above clearly reveals the knowledge of the IRS as to the manner in which the money orders were to be issued, the payroll purposes for which they were to be issued and the IRS order to ". . . go get them and bring them down here."

These facts in evidence should have precluded a determination of good faith and lack of notice on the part of the respondent in obtaining the money orders, and the failure of the trial court to address itself to these essentials in the make-up of a holder in due course should not have been followed by the assumption of the Court of Appeals that the District Court *implicitly* decided the question of good faith and notice, especially where the trial judge acknowledged that he did not find it a very pleasing thing that the government did (C.A. App. 209).

Because the Court of Appeals failed to do so, this Supreme Court is now respectfully requested to examine

the foundations for the District Court's summary characterization that the respondent is a holder in due course of the money orders issued by Petitioner.

III

THE COURT BELOW ERRED IN FAILING TO APPLY THE EQUITABLE "CLEAN HANDS" DOCTRINE TO THE UNITED STATES, WHERE THE UNITED STATES SOUGHT EQUITABLE RELIEF IN THE FORECLOSURE OF A LIEN UPON THE GENERAL ASSETS OF PETITIONER BANK FOR FAILURE TO PAY UPON MONEY ORDERS OBTAINED FROM PETITIONER BY WAY OF CONCEALMENT AND MISREPRESENTATION INDUCED BY INTERNAL REVENUE SERVICE AGENTS.

The general purposes of equity have been applied to the United States in a suit by it for equitable relief. *Pan-American Petroleum & Transport Co. vs. United States*, 273 U.S. 456, 506 (1926) and it has likewise been stated that the government may not invoke the aid of a court of equity if for any reason its conduct is such that it must be said to have come into court with unclean hands. *Deseret Apartments, Inc.* vs. *United States*, 250 F.2d 457 (10th Cir., 1957).

While the Court of Appeals for the Fifth Circuit, in a case involving the United States, has recognized the general rule that he who seeks equity must do equity, *Ehrlich* vs. *United States*, 252 F.2d 772 (5th Cir., 1958), it has, in the instant case, merely indicated that it is unwilling to quarrel with the trial judge's belief that conduct "insufficiently malignant" to deprive a party of holder of due course status is likewise an inadequate reason for refusing to grant an equitable remedy.

The BANK occupies its position in these proceedings because of the participation of the IRS and MEDALLION in a course of conduct which could only have been calculated to deceive the BANK. If such deceit had not been

intended, one bank money order for the total amount could have been requested, and there would have been no need for MEDALLION to furnish a listing of the wages of 190 electricians and to request of the BANK 190 separate money orders. It is manifest from the evidence that the respondent, through its agents, was aware of the purpose for which HANNAN had deposited it check to the payroll account of MEDALLION and the purpose for which the 190 money orders were to be issued by Petitioner on October 14, 1970, as they had been issued in the prior week.

Notwithstanding such knowledge, and before the issuance of such money orders, IRS called upon MEDALLION to procure, and abetted MEDALLION in the procurement of, the 190 money orders under false pretenses with the design that they be turned over by MEDALLION to IRS so that MEDALLION's taxes might be reduced. Had MEDALLION not, on the order of IRS diverted the money orders, they would not have come into the hands of IRS. Or, had MEDALLION or the IRS disclosed to the BANK the true purpose for which the money orders were sought, the BANK would not have issued such money orders. In either case the money orders would not have come into the hands of IRS through MEDALLION and no claim could be maintained by the respondent against the BANK

Under the governing state case law a plaintiff seeking equitable relief must be free of any inequitable conduct relative to the controversy, *Gables Racing Association, Inc.* vs. *Persky*, 6 So.2d 257, *Deal* vs. *Migoski*, 122 So.2d 415, and equity will not permit a person to profit from such persons owned guile, wrong and inequity. *Sahler* vs. *Sahler*, 17 So.2d 105; *Schmitt* vs. *Bethea*, 82 So. 817. Overreaching, concealment or other unconscientious conduct are sufficient to bar relief, *Dale* vs. *Jennings*, 107 So. 175.

The "clean hands" doctrine is the counterpart in equity of the defense of entrapment in criminal law, *Peters* vs. *Brown*, 55 So.2d 334; *Leesburg* vs. *Knight*, 164 So.2d 547. Petitioner suggests that the facts of this case evidence a form of entrapment practiced on the petitioner by MEDALLION and IRS acting in concert.

It is sufficient to deny relief in equitable proceedings, if the complaining party has been guilty of unscrupulous practices or overreaching, or has concealed important facts, thought not actually fraudulent or has been guilty of trickery, or taking undue advantage of his position, or unconscientious conduct. *Dale* vs. *Jennings*, 107 So. 175.

MEDALLION, on the direction of IRS, by (a) leading the BANK to rely upon past practices, (b) submitting to the BANK a listing of 190 separate amounts representing wages of individual electricians, (c) advising the BANK that the BANK was once again called upon to prepare MEDALLION's payroll, and (d) depositing the HANNAN company check to the payroll account, committed both concealment and misrepresentation, knowing the same to be false, with the intention that the BANK be induced to rely upon such concealment and misrepresentation, and as a consequence of this, the BANK acting in reliance has been substantially injured.

Whether or not the conduct of the IRS has been "sufficiently malignant" to deprive the respondent of holder in due course status (which petitioner suggests is the case) the Court of Appeals erred in applying that standard in allowing equitable relief to respondent, whose actions were sufficiently unjust, unscrupulous, unfair and unconscientious, being based as they were on misrepresentation and concealment, so as to disturb the trial judge and cause the Court of Appeals to concede that certain evidence supported the BANK's defensive theories.

IV

THE COURT BELOW ERRED IN GIVING TOO BROAD AN INTERPRETATION OF SECTION 6311 OF THE 1954 INTERNAL REVENUE CODE, SO AS TO PROVIDE FOR A LIEN UPON THE GENERAL ASSETS OF PETITIONER BANK WHERE (a) PETITIONER BANK NEVER ACTUALLY RECEIVED THE FUNDS FOR WHICH THE MONEY ORDERS WERE ISSUED, (b) THE MONEY ORDERS WERE OBTAINED FROM PETITIONER BANK BY WAY OF CONCEALMENT AND MISREPRESENTATION INDUCED BY AGENTS OF THE INTERNAL REVENUE SERVICE, AND (c) THE MONEY ORDERS WERE NOT DRAWN IN PAYMENT OF INTERNAL REVENUE TAXES, BUT INSTEAD WERE COMPLETED BY THE INTERNAL REVENUE SERVICE OTHERWISE THAN AS AUTHORIZED UNDER FLORIDA UNIFORM COMMERCIAL CODE SECTION 673.3-407.

As noted by the Court of Appeals, no reported decisions treat Section 6311 of the 1954 Internal Revenue Code. The wording of Section 6311(b)(2) does speak in terms of a "preference" given to the United States over "any other claims whatsoever against such bank or issuer, except the necessary costs and expenses of administration and the reimbursement of the United States for the amount expended in the redemption of the circulating note of such bank." These words reflect that the purpose of the statute was to enable the United States to maintain a preferential position as against general creditors under circumstances such as appeared in the case of *American Tobacco Co.* vs. *South Carolina National Bank*, 15 F.Supp. 215, where checks, certified by the defendant bank in that case and forwarded to the collector of Internal Revenue were not paid by reason of a bank holiday proclaimed by the President of the United States. That is, the statute governs the situation where a bank has actually obtained and retained funds against which

remittance was made, but where, as in a bank failure, a situation arises with multiple claims being made against the bank by creditors. In such a situation, the United States obtains a preference in payment. Except in such a situation, there would be no reason for the statute to talk in terms of "expenses of administration" and the "redemption of the circulating notes of such bank."

In the instant case the IRS ordered MEDALLION to procure the money orders from the BANK under false pretenses and then, by inserting the name "Internal Revenue Service" in the place for payee, IRS completed the money orders otherwise than as authorized so that under 673.3-407 Florida Statutes (App. 4a) there was a material alteration of the instrument, which should have discharged the BANK from liability for payment, since IRS was not a *subsequent* holder in due course.

Such material alteration when it became known to HANNAN resulted in the latter's stop payment order on the check deposited to MEDALLION's payroll account which in turn prevented the BANK's collection of the funds against which the money orders were issued.

Despite this, respondent seeks to use Section 6311 not as a device to maintain the preferential position of the United States as against general creditors under circumstances where the BANK has actually obtained and retained funds against which the remittance was made and drawn in payment of Internal Revenue taxes, but rather as a trap which the IRS, acting in concert with MEDALLION, has helped bait and having taken in the BANK, IRS now seeks to extract from the BANK monies which the BANK itself has never received.

This Court has granted a petition for writ of certiorari to review a too narrow interpretation of an income tax statute given by the Tax Court and a Court of Appeals, *Commissioner of Internal Revenue* vs. *Lo Bue*, 351 U.S. 244. Such opportunity for review should like-

wise exist to review too broad an interpretation given to an income tax statute by a Court of Appeals.

The broad interpretation given to the statute by the Court of Appeals for the Fifth Circuit has enabled the IRS to profit at the expense of an innocent party as a consequence of a situation created by the IRS and to use the statute as a sword against such innocent party and not merely as a shield to protect the United States against the loss of a taxpayer's assets.

CONCLUSION

The questions presented by this case are of great and recurring significance, particularly as they relate to the administration of the income tax laws and the conduct of the Internal Revenue Service in such administration. For this reason and the reasons set forth above, it is respectively submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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By _____
SHELDON ROSENBERG

By _____
LEWIS M. RESS

AMENDMENT FIVE TO THE CONSTITUTION OF THE UNITED STATES

No person shall be . . . deprived of life, liberty or property without due process of law . . . .

SEC. 6311. PAYMENT BY CHECK OR MONEY ORDER.

(a) *Authority to Receive.*—It shall be lawful for the Secretary or his delegate to receive for internal revenue taxes, or in payment for internal revenue stamps, checks or money orders, to the extent and under the conditions provided in regulations prescribed by the Secretary or his delegate.

(b) *Check or Money Order Unpaid.*—

(1) *Ultimate liability.*—If a check or money order so received is not duly paid, the person by whom such check or money order has been tendered shall remain liable for the payment of the tax or for the stamps, and for all legal penalties and additions, to the same extent as if such check or money order had not been tendered.

(2) *Liability of banks and others.*—If any certified, treasurer's or cashier's check or any money order so received is not duly paid, the United States shall, in addition to its right to exact payment from the party originally indebted therefor, have a lien for the amount of such check upon all the assets of the bank or trust company on which drawn or for the amount of such money order upon all the assets of the issuer thereof; and such amount shall be paid out of such assets in preference to any other claims whatsoever against such bank or issuer except the necessary costs and expenses of administration and the reimbursement of the United States for the amount expended in the redemption of the circulating notes of such bank.

673.3-302 *Holder in due course*

(1) A holder in due course is a holder who takes the instrument:

(a) For value; and

(b) In good faith; and

(c) Without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

(2) A payee may be a holder in due course.

(3) A holder does not become a holder in due course of an instrument:

(a) By purchase of it at judicial sale or by taking it under legal process; or

(b) By acquiring it in taking over an estate; or

(c) By purchasing it as part of a bulk transaction not in regular course of business of the transferor.

(4) A purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased.

673.3-407 *Alteration*

(1) Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in:

(a) The number or relations of the parties; or

(b) An incomplete instrument, by completing it otherwise than as authorized; or

(c) The writing as signed, by adding to it or by removing any part of it.

(2) As against any person other than a subsequent holder in due course:

(a) Alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;

(b) No other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given.

(3) A subsequent holder in due course may in all cases enforce the instrument according to its original tenor, and when an incomplete instrument has been completed, he may enforce it as completed.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-2586

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SECOND NATIONAL BANK OF NORTH MIAMI,
Defendant-Appellant.

Oct. 4, 1974

Action was brought by United States against bank, which had issued money orders which had been tendered to United States for payment of tenderer's tax liability and on which bank had stopped payment after failing to receive proceeds of covering check, to foreclose lien against bank assets for the amount of money orders. The United States District Court for the Southern District of Florida, at Miami, Joe Eaton, J., entered a judgment for the Government and the bank appealed. The Court of Appeals, Goldberg, Circuit Judge, held that under unambiguous terms of statute giving United States lien against assets of bank the Government was entitled to foreclose lien, that Government's action did not preclude it from obtaining equitable relief and that Government had no duty to inform bank that money orders were tendered to it for payment of taxes rather than for wages for which they had been originally issued.

Affirmed.

1. Statutes §§ 181(1), 189

Court's duty is to give effect to intent of Congress and in so doing the first reference is to the literal meaning of words employed.

2. Statutes § 217.4

There is no need to refer to legislative history where statutory language is clear.

3. Statutes § 190

Court cannot disregard plain substance of a statute because of theoretical and irrelevant ambiguities.

4. Statutes § 190

Harshness does not in itself constitute ambiguity in statute.

5. Internal Revenue § 1712

Obvious meaning of statute giving United States a lien on all assets of bank or trust company on which is drawn a certified, treasurer's or cashier's check or any money order received by Internal Revenue Service for payment of taxes which is not duly paid is that the taxpayer remains liable and the United States may also have a lien on the assets of bank or trust company on which instrument was drawn, and it is not necessary to bank's liability that the negotiable instrument be drawn explicitly for payment of taxes, that bank receive sufficient funds to cover the instrument and that bank either fails or closes. 26 U.S.C.A. (I.R.C. 1954) § 6311.

6. Banks and Banking § 189

Where bank as a part of payroll financing scheme issued money orders in varying amounts for payroll of financially pressed subcontractor but money orders were delivered to the Internal Revenue Service for subcontractor's tax liability after which Internal Revenue Service inserted its name as payee, bank was liable to Government under statute for the amount of money orders on which it stopped payment after payment was stopped on check which was being used to cover the money orders. 26 U.S.C.A. (I.R.C. 1954) § 6311.

7. Statutes § 174

Office of judge is always to make such construction as to suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief.

8. Internal Revenue § 1714

Under statute giving United States lien on assets of bank or trust company on which is drawn a certified, treasurer's or cashier's check or money order which is tendered for payment of taxes and which is not duly paid, it is not necessary for applicability of statute that district director refuses to accept a taxpayer's tender of such negotiable instrument for taxes if payment of taxes was not the original motive for drawing the instrument. 26 U.S.C.A. (I.R.C. 1954) § 6311.

9. Internal Revenue § 1711

Liens to guarantee payment of taxes are an important element of sovereign's taxing power and the establishment of tax lien by Congress is an exercise of its constitutional power to lay and collect taxes.

10. Bills and Notes §§ 451(1), 452(1)

Simple holder of negotiable instrument, in contrast to a holder in due course, takes instrument subject to all defenses of any party which would be available in an action on simple contract as well as defenses of want or failure of consideration, nonperformance of any condition precedent, nondelivery, or delivery for a special purpose. West's F.S.A. §§ 673.305, 673.306.

11. Courts § 406.3(24)

Where determination that a party was a holder in due course was essentially factual, it should not be reversed unless clearly erroneous. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

12. Courts § 406.3(6)

When district court's findings of fact are challenged, the question is not simply whether reviewing court would have found otherwise but whether trial court could permissibly find as it did. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

13. Courts § 406.3(9)

In determining whether finding is clearly erroneous, due regard must be given to opportunity of trial court to judge credibility of witnesses. Fed.Rules. Civ.Proc. rule 52(a), 28 U.S.C.A.

14. Courts § 406.3(24)

Review of record as whole, in action by United States against bank to collect on money orders drawn on bank and tendered to United States for payment of tax liability of tenderer before bank stopped payment on money orders, showed more than ample evidence to support trial court's findings that the United States was a holder in due course of the money orders. 26 U.S.C.A. (I.R.C. 1954) § 6311; Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.; West's F.S.A § 673.305.

15. Courts § 406.3(6)

Where Court of Appeals was not left with a definite and firm conviction that a mistake had been committed, district court's finding of fact would not be rejected.

16. Bills and Notes § 342

United States which inserted its name as payee in money orders of bank tendered to it for payment of taxes was a holder in due course of the money orders on which bank stopped payment. West's F.S.A. § 673.302(2).

17. United States § 126

When seeking an equitable remedy, United States is no more immune to general principles of equity than any

other litigant although these principles will not be applied to frustrate the purpose of its laws or thwart public policy.

18. Equity § 11

There is no authority by which equity can come to the aid of an illegal and fraudulent scheme, regardless of the beneficence of the ultimate purpose.

19. Equity § 65(1)

Unless Government did something wrong which in good conscience it should have done or failed to do something fair dealing required it to do, it comes into court with clean hands and is entitled to equitable relief it obtains.

20. Equity § 65(1)

Whether contamination of one seeking equity justifies chancellor in turning a deaf ear is in the first instance for the chancellor to decide.

21. United States § 126

Action of Government in persuading subcontractor, which had received money orders with payee designations left blank from bank pursuant to a payroll financing scheme, to turn over the money orders to Government in payment of subcontractor's liability for withholding taxes did not constitute such inequitable conduct as would deprive Government of right to foreclose lien on assets of bank which stopped payment on money orders after the proceeds from check which was to cover the money orders were not received. 26 U.S.C.A. (I.R.C. 1954) § 6311.

22. United States § 78(5)

Failure of United States, to which subcontractor tendered, in discharge of its withholding tax liability, bank money orders which had been issued as part of transaction for financing subcontractor's payroll, to notify bank

that money orders would not be used to pay subcontractor's employees but had been tendered for taxes did not impose any liability on United States with respect to bank which was assessed in state court a late penalty payment under union contract regarding timely payment of wages. 28 U.S.C.A. § 1346(b).

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM and GOLDBERG, Circuit Judges, and LYNNE, District Judge.

GOLDBERG, Circuit Judge:

A little-known weapon in the government's tax collection arsenal has turned a bank employee's mistake into a banker's nightmare. Originally financial go-between for a harried general contractor and a financially-troubled subcontractor, the Second National Bank of North Miami now finds itself caught between the relentless federal tax collector and a resourceful taxpayer. The hapless bank appeals an adverse judgment which has left it holding the bag of someone else's tax liability. We affirm.

I. FACTS

The skeletal framework of this controversy is undisputed although several important factual details remain bones of contention. In the fall of 1970 Medallion Electric Company, Inc. [Medallion], an electrical subcontractor working for The Hannon Company [Hannon] on the construction of the Midway Mall Shopping Center in Dade County, Florida, began having difficulties meeting its payroll and setting aside sufficient amounts to pay withholding taxes due the United States. After a series of payroll checks drawn on defendant-appellant Second National

Bank [bank] were returned unpaid due to insufficient funds, the business agent of Medallion's employees' union, acting pursuant to the contract with Medallion, refused to accept further payroll payments except in the form of cash, cashier's checks, or the equivalent. To meet the union's demand and to prevent further interruptions in the progress of the construction, Medallion and Hannon arranged a net payroll financing operation with appellant bank as financial intermediary.

Under the arrangement Hannon would draw a check in the amount of the net payroll on its account at City National Bank to the joint order of appellant bank and Medallion, and would deposit this check in Medallion's payroll account at appellant bank, where Medallion also maintained a general account.[1] With these funds Medallion would purchase 190 individual money orders signed and issued by appellant. Working from a payroll schedule furnished by Medallion, appellant would prepare each money order with the payee blank but in the exact amount of an employee's net weekly wages. Medallion would then fill in the name of the employee-payee. No withholding tax was set aside.

The bank issued the first set of 190 money orders on or about October 5, 1970. Because an influential bank customer had guaranteed Hannon's check, appellant bank issued the money orders on uncollected funds, that is, before Hannon's check had cleared City National Bank. Medallion received the money orders, filled in the names of the employees, and met the payroll. Subsequently Hannon's check cleared and was paid by City National Bank.

Sometime before appellant was to issue the second series of money orders, employees of the Internal Revenue

[1] Apparently these checks were intended to be partial payments for work already completed by Medallion rather than extensions of credit.

Service met with Medallion representatives, including Leonard Gutkin, president of Medallion, and Alphonse Schwitalla, Medallion's attorney, regarding Medallion's withholding taxes for the third quarter of 1970.[2] Although who said what to whom and in what tone of voice is a matter of some dispute, it is clear that Medallion agreed to turn the second set of money orders over to the IRS for application against existing tax liability.

On October 14 Hannon's second check, in the amount of $83,000, was delivered to appellant and credited to Medallion's payroll account. Since no one had guaranteed payment of this check, appellant's president, Alfred Slobusky, did not, as he had done the first week, approve the issuance of the money orders on uncollected funds. Unfortunately, after telephoning City National Bank to verify that Hannon had sufficient funds on deposit to cover the check, appellant's assistant cashier followed the previous weeks' procedure and issued the 190 money orders in the total face amount of $92,355.86.[3] Medallion then delivered the money orders to the IRS, which inserted in each payee blank the words "to the order of the Internal Revenue Service, Room 426, 51 S.W. 1st Avenue, Miami, Florida, 33130."

On learning from Medallion's employees that they had not been paid, Hannon stopped payment on the $83,000 check, which had not yet cleared City National Bank. In its turn appellant stopped payment on the money orders, and immediately informed the Collection Division of the IRS of its reasons for the action. On October 27 the money orders were presented for payment and

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[2] Although the quarter ended in September 1970, Medallion's tax return for the period was not due until the end of October.

[3] Hannon's October 14 check, for $83,000, was insufficient to cover Medallion's payroll for the week; on discovering the shortage from appellant's assistant cashier, however, Hannon wired the necessary additional funds, $9,434.61, to appellant, which then credited the funds to Medallion's account.

returned unpaid. In the meantime, Hannon paid the regular net wages to Medallion's employees, as well as an additional $10,000 in penalty payments due under Medallion's union contract for late payment of wages. Thereafter Hannon sued appellant in state court to recover the penalty payments, and won a $10,000 judgment, which appellant has paid.

The United States filed suit in the United States District Court to reduce its claim on the money orders to judgment and to foreclose a statutory lien on appellant's assets, asserted pursuant to 26 U.S.C. § 6311(b)(2). The bank denied liability on the money orders, and in addition filed a counterclaim under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), to recover the amount of the judgment paid by the bank in Hannon's state court suit. Following a bench trial the district court held that the United States is a holder in due course of the money orders; that the bank is liable to the United States in the amount of $92,355.86, the face amount of the money orders, plus interest; that a lien exists in favor of the United States on all bank assets to secure payment of the judgment; and that the counterclaim is meritless. The bank raises four issues on appeal, which we treat *seriatim*.

II. APPLICABILITY OF SECTION 6311

Appellant's first line of attack focuses on the statutory underpinnings of the judgment below. Section 6311 in its entirety provides:

> *Payment by check or money order*
>
> *(a) Authority to receive.*—It shall be lawful for the Secretary or his delegate to receive for internal revenue taxes, or in payment for internal revenue stamps, checks or money orders, to the extent and under the conditions provided in regulations prescribed by the Secretary or his delegate.

(b) Check or money order unpaid.—

(1) Ultimate liability.—If a check or money order so received is not duly paid, the person by whom such check or money order has been tendered shall remain liable for the payment of the tax or for the stamps, and for all legal penalties and additions, to the same extent as if such check or money order had not been tendered.

(2) Liability of banks and others.—If any certified, treasurer's, or cashier's check or any money order so received is not duly paid, the United States shall, in addition to its right to exact payment from the party originally indebted therefor, have a lien for the amount of such check upon all the assets of the bank or trust company on which drawn or for the amount of such money order upon all the assets of the issuer thereof; and such amount shall be paid out of such assets in preference to any other claims whatsoever against such bank or issuer except the necessary costs and expenses of administration and the reimbursement of the United States for the amount expended in the redemption of the circulating notes of such bank.

Appellant asseverates that the statutory lien provision applies only when (a) money orders or other negotiable instruments have been drawn explicitly in payment for taxes *and* (b) the bank has received sufficient funds to cover the instruments *and* (c) the bank has either failed or closed due to a bank holiday of the sort common during the 1930's. Since none of these conditions existed in the case at bar, bank argues, the district court should have refused to impose a lien on the bank's assets in favor of the United States. We disagree.

[1, 2] Our review of appellant's applicability argument must begin with the principle that our duty "is to give effect to the intent of Congress, and in doing so

our first reference is . . . to the literal meaning of the words employed." Flora v. United States, 1958, 357 U.S. 63, 65, 78 S.Ct. 1079, 1081, 2 L.Ed.2d 1165, 1167. "Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning." Perry v. Commerce Loan Co., 1966, 383 U.S. 392, 400, 86 S.Ct. 852, 857, 15 L.Ed.2d 827, 833, quoting United States v. American Trucking Associations, 1940, 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L.Ed. 1345, 1350; Ray Baille Trash Hauling, Inc. v. Kleppe, 5 Cir. 1973, 477 F.2d 696, 707. And we must be constantly mindful that

> there is no need to refer to the legislative history where the statutory language is clear. "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." Gemsco, Inc. v. Walling, 324 U.S. 244, 260, 65 S.Ct. 605, 615, 89 L.Ed. 921, 933 (1945).

Ex parte Collett, 1949, 337 U.S. 55, 61, 69 S.Ct. 944, 947, 93 L.Ed. 1207, 1211; General Electric Co. v. Southern Construction Co., 5 Cir. 1967, 383 F.2d 135, 138 & n. 2, cert. denied, 1968, 390 U.S. 955, 88 S.Ct. 1049, 19 L.Ed.2d 1148.

[3-6] We are convinced that on careful, reasonable examination, the text of section 6311 yields a plain, unambiguous meaning. The statute allows taxpayers to use certain types of negotiable instruments in paying their internal revenue taxes. In addition it supplies two means of protecting the interests of the United States in the event the particular negotiable instrument is not duly paid: the taxpayer remains liable for the taxes; and the United States may also have a lien on the assets of the bank or trust company that issued or on which the

instrument was drawn.[4] Bank complains of the harsh result from this plain, common-sense reading of the statute. Our answer must be that we cannot "discard the plain substance of a statute because of theoretical and irrelevant ambiguities" and that "[h]arshness does not in itself constitute ambiguity." First National City Bank v. Compania de Aguaceros, S. A., 5 Cir. 1968, 398 F.2d 779, 784. We see nothing in the statutory language to suggest the limitations proposed by the bank; and giving the statute its obvious, apparent meaning, we can find no error in the decision of the trial court to apply it to the facts of the instant case.

Ordinarily, the determination that a statute has, on its face, a plain, unambiguous meaning obviates the necessity for extended statutory interpretation. Appellant insists, however, that we must accept its restrictive reading of the statute if we are to avoid colliding with clearly established legislative purpose. Pointing to the history, case law, and regulations pertaining to § 6311, appellant argues that "the purpose of this statute is to enable the United States to maintain a preferential position as against general creditors under circumstances . . . where checks, certified by the defendant bank and forwarded to the collector of Internal Revenue, were not paid by reason of a bank holiday proclaimed by the President of the United States." Reply Brief of Appellant at 16.

[7] The courts of this country have long disfavored the rigid rule of our English brethren that "If Parliament does not mean what it says it must say so." C. I. R. v. Mercantile National Bank, 5 Cir. 1960, 276 F.2d 58; *see* C. Nutting, S. Elliott, & R. Dickerson, Legislation—Cases and Materials 413-14 (1969). For example, in

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[4] As we read the statute, the placement of the first-preference provision in a separate clause of § 6311(b)(2) means that this is an additional protection for the United States, not the *only* protection as bank would have it.

Church of the Holy Trinity v. United States 1892, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226, 228, the Supreme Court said:

> It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. . . . [F]or frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

The Court has also noted that "even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has [frequently] followed that purpose, rather than the literal words." United States v. American Trucking Associations, 1940, 310 U.S. 534, 543, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345, 1350, quoted in Perry v. Commerce Loan Co., 1966, 383 U.S. 392, 400, 86 S.Ct. 852, 15 L.Ed.2d 827, 833-834; *accord*, United States v. Public Utilities Commission, 1953, 345 U.S. 295, 315, 73 S.Ct. 706, 97 L.Ed. 1020, 1037; Brennan v. Greene's Propane Gas Service, Inc., 5 Cir. 1973, 479 F.2d 1027, 1030 & n. 10; *see* United States v. Louisiana, E.D.La.1963, 225 F.Supp. 353, 361 (Wisdom, Circuit Judge), aff'd, 1965, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709. When faced with an argument that the literal meaning of a statute is at variance with the legislative purpose, a court can follow no better guide than Sir Edward Coke's "Mischief Rule": "The Office of Judges is always to make such construction as to suppress the Mischief and advance the Remedy; and to suppress subtle Inventions and Evasions for Continuance of the Mischief." Heydon's Case, 3 Co. 7a, 7b, Magdalon

College Case, 11 Co. 66b, 72b, quoted in Burstein v. United States Lines Co., 2 Cir. 1943, 134 F.2d 89; *accord*, Miller v. Lykes Brothers Steamship Co., 5 Cir. 1972, 467 F.2d 464, 467; Richland Development Co. v. Staples, 5 Cir. 1961, 295 F.2d 122, 128; Stanga v. McCormick Shipping Corp., 5 Cir. 1959, 268 F.2d 544, 549.

With the aid of the Historical Note following 26 U.S.C. § 6311, the historical lineage of the statutory lien provision is not difficult to trace.[5] The genesis was apparently "An Act To Authorize the receipt of certified checks drawn on national and State banks for duties on imports and internal taxes, and for other purposes," Act of Mar. 2, 1911, ch. 191, § 1, 36 Stat. 965.[6] The abbreviated legislative history of this statute clearly indicates that the statute was intended to relieve taxpayers of the inconvenience, inefficiency, and danger concomitant with the then current requirement that all customs duties be paid in actual cash or gold. The first-lien provision was designed to protect against all possibility of loss the interests of both the United States and the revenue col-

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[5] In undertaking to probe the legislative history of this statute, we are wary of the dangers of reaching a decision that, in the eloquent words of Mr. Justice Jackson,

> pulls federal law, not only out of the dark where it has been hidden, but into a fog in which little can be seen if found. Legislative history here as usual is more vague than the statute we are called upon to interpret.

United States v. Public Utilities Commission, 1953, 345 U.S. 295, 320, 73 S.Ct. 706, 720, 97 L.Ed. 1020, 1040 (concurring opinion).

[6] In pertinent part this statute provided that it shall be lawful for collectors of customs and of internal revenue to receive for duties on imports and internal taxes certified checks drawn on national and State banks, and trust companies . . . . [No person who tenders such check shall be released from liability until the certified check is duly paid]; and if any such check so received is not duly paid by the bank on which it is drawn and so certifying, the United States shall, in addition to its right to exact payment from the party originally indebted therefor, have a lien for the amount of such check upon all the assets of such bank . . . .

lectors, who at that time retained liability for taxes collected until payment was final.[7] Nothing in either the House Committee Report or the debates accompanying passage of the statute suggests the restrictive interpretation proposed by appellant.[8] In 1913 the statute was amended in order to allow certified checks to be acceptable payment for any and all federal taxes. Act of Mar. 3, 1913, ch. 119, 37 Stat. 733.[9] Both the Committee Reports and the brief floor remarks indicate that the change was intended only to broaden the use of certified checks in payment for taxes because of favorable experience under the 1911 statute.[10] No mention was made of the lien provision, which was carried forward unchanged.

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[7] H.R. Rep. No. 2041, 61st Cong., 3d Sess. (1911); 46 Cong. Rec. 2076, 2077-78, 2083 (1911).

[8] The limited debate in both the House of Representatives and the Senate focused on whether the statute would diminish the supply of gold in the hands of the United States and whether the act should include state banks and trust companies, who it was feared would suffer competitively if omitted but over the assets of whom the authority of the United States to acquire a lien was questioned. 46 Cong. Rec. 2077, 2078, 2083, 2240, 2501, 3411, 3412 (1911). One representative did remark of the lien provision "that upon failure of the bank those checks should have priority of payment," *id.* at 2077 (remarks of Rep. Mann), but we hardly think that passing reference justifies a conclusion that bank failure was the *sine qua non* of the operation of the lien provision. We note also that the Senate defeated an amendment that would have substituted a different version of the text omitting the lien provision. *Id.* at 3412.

[9] The statute as amended provided, *inter alia*, that

> it shall be lawful for collecting officers to receive certified checks drawn on national and State banks and trust companies, . . . in payment for duties on imports, internal taxes, and all public dues, including special customs deposits . . . .

[10] H.R. Rep. No. 841, 62d Cong., 2d Sess. (1913); S. Rep. No. 1276, 62d Cong., 2d Sess. (1913); 49 Cong. Rec. 8307, 8308 (1913). According to both Committee Reports, which are identical, the bill "removes all limitations as to the use of certified checks in the payment of dues by authorizing the receipt of such checks in the payment of all Government dues without further legislation."

The 1911 act as amended became § 3656 of the 1939 Internal Revenue Code, Act of Feb. 10, 1939, ch. 2, 53 Stat. 1, 447.[11] Although the new code formally arranged the provisions in a different fashion,[12] the legislative his-

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[11] At various times in the intervening years Congress passed special legislation authorizing receipt of certificates of indebtedness of the United States and uncertified checks in payment of income, warprofits, and excess profits taxes. Act of Oct. 3, 1917, ch. 63, § 1010, 40 Stat. 327 (War Revenue Act); Act of Feb. 24, 1919, ch. 18, § 1314, 40 Stat. 1145 (Revenue Act of 1918); Act of Nov. 23, 1921, ch. 136, § 1325, 42 Stat. 316 (Revenue Act of 1921). None of those statutes contained lien provisions; and both § 3656(b) of the 1939 Code and the current version of § 6311(b)(2) continue to distinguish certified checks, cashiers' checks, and treasurers' checks and money orders, which give rise to liens from all other checks, which do not.

[12] § *3656. Payment by check and money orders*

(a) Certified, cashiers', and treasurers' checks and money order

(1) Authority to receive. It shall be lawful for collectors to receive for internal revenue taxes or in payment of stamps to be used in payment of internal revenue taxes certified, cashiers', and treasurers' checks drawn on National and State banks and trust companies, and United States postal, bank, express, and telegraph money orders, during such time and under such regulations as the Commissioner, with the approval of the Secretary, may prescribe.

(2) Discharge of liability.

(A) Check duly paid. No person who may be indebted to the United States on account of internal revenue taxes or stamps used or to be used in payment of internal revenue taxes who shall have tendered a certified, cashier's, or treasurer's check or money order as provisional payment therefor, in accordance with the terms of this subsection, shall be released from the obligation to make ultimate payment thereof until such certified, cashier's, or treasurer's check or money order so received has been duly paid.

(B) Check unpaid. If any such checks or money order so received is not duly paid the United States shall, in addition to its right to exact payment from the party originally indebted therefor, have a lien for the amount of such check upon all the assets of the bank on which

tory indicates that the act—"To Consolidate and codify the internal-revenue laws of the United States"—wrought no changes in the substance of the existing tax laws.[13] In 1944 Congress amended § 3656 to broaden the types of negotiable instruments that could be received in payment of federal taxes, Act of Dec. 22, 1944, ch. 672, 58 Stat. 912. The change, designed entirely for the convenience of taxpayers, simply extended the payment and lien provisions relating to certified checks to include cashiers' and treasurers' checks and various types of money orders.[14] Again, nothing in the legislative history suggests any intention that the plain words of the statute be narrowly interpreted.[15]

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drawn or for the amount of such money order upon all the assets of the issuer thereof; and such amount shall be paid out of its assets in preference to any or all other claims whatsoever against said bank or issuer except the necessary costs and expenses of administration and the reimbursement of the United States for the amount expended in the redemption of the circulating notes of such bank.

(b) Other checks

(1) Authority to receive. Collectors may receive checks in addition to those specified in subsection (a) in payment of taxes other than those payable by stamp during such time and under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe.

(2) Ultimate liability. If a check so received is not paid by the bank on which it is drawn the person by whom such check has been tendered shall remain liable for the payment of the tax and for all legal penalties and additions to the same extent as if such check had not been tendered.

[13] H.R. Rep. No. 6, 76th Cong., 1st Sess. 3 (1939); S. Rep. No. 20, 76th Cong., 1st Sess. 1 (1939); 84 Cong. Rec. 646 (1939).

[14] H.R. Rep. No. 2018, 78th Cong., 2d Sess. 1 (1944); S. Rep. No. 1357, 78th Cong., 2d Sess. (1944); 90 Cong. Rec. 8911-12 (1944).

[15] According to the House Committee Report,

The Collection of taxes will not be impaired inasmuch as all the instruments have the common characteristic that once in the hands of the collector they cannot be revoked and their

Section 3656 of the 1939 Code as amended became § 6311 of the 1954 Internal Revenue Code, 26 U.S.C. § 6311. Although the 1954 Code rearranged the provisions of § 3656, no significant substantive changes—and none at all relating to the proper interpretation of the lien provision—were made.[16]

As we read this legislative history, the statutory lien provision was designed as a counter-weight to the allowance of new methods of paying internal revenue taxes; at the same time that taxpayers were offered increased convenience, the government was to receive increased protection of its interest in receiving the taxes owing not only by retaining the right to pursue the taxpayer, but also by gaining the right to hold the respective bank or trust company for negotiable instruments not duly paid. Congress may have foreseen that the principal need for the lien protection would arise in the case of bank failures or holidays, but to assert that to be the only situation in which they desired to protect the government's interests would require the most extravagant legislative psychoanalysis. The legislature may not have predicted that a bank would someday issue negotiable money orders on funds it did not yet have in hand, but that is no justification for niggardly statutory construction. Appellant's

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acceptance would be subject to regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

H.R. Rep. No. 2018, 78th Cong., 2d Sess. 1 (1944).

[16] The only apparent substantive change effected by the 1954 Code related to payment for internal revenue stamps. Section 3656(b)(1) had limited checks other than certified, cashiers', and treasurers' and money orders to "payment of taxes other than those payable by stamp." Section 6311(a) of the 1954 Code removed this limitation as to the use of other checks in payment for internal revenue stamps. H.R. Rep. No. 1337, 83d Cong., 2d Sess. ch. 64 (1954), U.S. Code Cong. & Admin. News, p. 4025; S. Rep. No. 1622, 83d Cong., 2d Sess. ch. 64 (1954), U.S. Code Cong. & Admin. News, p. 4629.

proposed interpretation of the statute would not, in our view, suppress the mischief and advance the remedy encompassed by this law, and would on the contrary constitute a "subtle invention and evasion for continuance of the mischief."

Although we do not deny that in ascertaining the meaning and purpose of a statute "consideration must be given to . . . the operation and administration of the statute prior to litigation," [17] we can find no more support for the bank's legislative purpose argument in the case law and regulations relating to § 6311 and its predecessors than we could in the legislative history. No reported decisions treat § 6311, and the few that involve prior statutory configurations offer no persuasive basis for the bank's argument.

Certainly the only case cited by appellant, American Tobacco Co. v. South Carolina National Bank, E.D.S.C. 1936, 15 F.Supp. 215, offers no solace. To the extent that the decision retains vitality, a question about which we intimate no view, it stands for no more than that when because of a bank holiday a bank has refused to honor one of the particular negotiable instruments and the taxpayer has been forced to pay the taxes in another manner, the taxpayer may, with the government's cooperation, stand in the government's shoes regarding the statutory lien.[18] Nothing in the opinion suggests that the statute's utility be limited to such a situation.

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[17] 2 Sutherland, Statutory Construction 321 (Horack ed. 1943), quoted in Woodwork Mfg. Assn. v. NLRB, 1967, 386 U.S. 612, 620 n. 5, 87 S.Ct. 1250, 1255, 18 L.Ed.2d 357, 364 n. 5.

[18] In *American Tobacco Co.* the taxpayer attempted to use three certified checks drawn on defendant bank to pay internal revenue taxes, but the checks were not paid due to a bank holiday. Subsequently the taxpayer paid the tax liability and received from the IRS both the unpaid certified checks and an assignment of the government's statutory lien against the bank's assets. When the bank refused to honor the certified checks, taxpayer brought suit. Bank argued that since the statutory lien was only for the benefit

[8] Moreover, even recognizing that regulations under the Internal Revenue Code are entitled to considerable weight in construing the Code, *cf.* Weeks v. Southern Bell Telephone & Telegraph Co., 5 Cir. 1969, 408 F.2d 228, 235, we find nothing ineluctable, or even persuasive, in the fragment of the regulations cited by appellant that "District Directors may accept checks drawn . . . in payment for Internal Revenue taxes . . . ." Brief for Appellant at 28, citing 26 C.F.R. § 301.6311-1(a).[19] Appel-

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of the government, allowing the taxpayer to recover would be unjust to the other creditors of the bank. The court disagreed; reasoning that the funds originally deposited for the checks and subject to immediate demand by the government never changed in nature simply because the government chose to pursue the taxpayer rather than the lien, the court concluded that to refuse to allow taxpayer to stand in the government's shoes in enforcing the lien would only unjustly enrich general creditors with money over which they had no legitimate claim. *Accord*, Cuesta, Ray & Co. v. Newsom, 1931, 102 Fla. 853, 136 So. 551.

[19] These regulations provide, *inter alia*:

> (a) *Authority to receive*—(1) *In general.* (i) District directors may accept checks drawn on any bank or trust company incorporated under the laws of the United States or under the laws of any State, Territory, or possession of the United States, or money orders in payment for internal revenue taxes, provided such checks or money orders are collectible in U.S. currency at par, and subject to the further provisions contained in this section. District directors may accept such checks or money orders in payment for internal revenue stamps to the extent and under the conditions prescribed in subparagraph (2) of this paragraph. A check or money order in payment for internal revenue taxes or internal revenue stamps should be made payable to the Internal Revenue Service. A check or money order is payable at par only if the full amount thereof is payable without any deduction for exchange or other charges. As used in this section, the term "money order" means: (*a*) U.S. postal, bank, express, or telegraph money order; (*b*) money order issued by a domestic building and loan association (as defined in section 7701(a)(19)) or by a similar association incorporated under the laws of a possession of the United States; (*c*) a money order issued by such other organization as the Commissioner may designate; and (*d*) a money order described in subdivision (ii) of this subpara-

lant interprets this language to mean that a District Director may not accept a taxpayer's tender of cashiers', certified, or treasurers' checks or money orders for taxes if payment of the taxes was not the original motive for drawing the instruments. The most obvious defect in this interpretation is that it runs counter to the undisputed legislative purpose of making payment of taxes more convenient through use of negotiable instruments. We decline to affix such basically extraneous and irrele-

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graph in cases therein described. However, the district director may refuse to accept any personal check whenever he has good reason to believe that such check will not be honored upon presentment.

(b) *Checks or money orders not paid*—(1) *Ultimate liability.* The person who tenders any check (whether certified or uncertified, cashier's, treasurer's, or other form of check) or money order in payment for taxes or stamps is not released from his liability until the check or money order is paid; and, if the check or money order is not duly paid, he shall also be liable for all legal penalties and additions, to the same extent as if such check or money order had not been tendered. For the penalty in case a check or money order is not duly paid, see section 6657 and § 301.6657-1. For assessment of the amount of a check or money order not duly paid, see section 6201(a)(2)(B) and paragraph (a)(2)(ii) of § 301.6201-1.

(2) *Liability of banks and others.* If any certified, treasurer's, or cashier's check or money order is not duly paid, the United States shall have a lien for the amount of such check upon all assets of the bank or trust company on which drawn or for the amount of such money order upon the assets of the issuer thereof. The unpaid amount shall be paid out of such assets in preference to any other claims against such bank or issuer except the necessary costs and expenses of administration and the reimbursement of the United States for the amount expended in the redemption of the circulating notes of such bank. In addition, the Government has the right to exact payment from the person required to make the payment.

(c) *Payment in nonconvertible foreign currency.* For rules relating to payment of income taxes and taxes under the Federal Insurance Contributions Act in nonconvertible foreign currency, see section 6316 and the regulations thereunder. [32 F.R. 15241, Nov. 3, 1967, as amended by T.D. 7188, 37 F.R. 12795, June 29, 1972]

vant considerations as the taxpayer's motive in acquiring instruments onto a bank's normal obligations on the instruments.

[9] Finally, the bank suggests that application of § 6311 to the facts of this case would constitute a taking of its property without due process in violation of the Fifth Amendment to the United States Constitution.[20] We see no merit in this argument. It has long been recognized that liens to guarantee payment of taxes are an important element of the sovereign's taxing power. *See* International Harvester Corp. v. Goodrich, 1956, 350 U.S. 537, 544, 76 S.Ct. 621, 100 L.Ed. 681, 689; Barkley v. Board of Levee Commissioners, 1876, 93 U.S. (23 Wall.) 258, 265, 23 L.Ed. 893, 896. And "[t]he establishment of a tax lien by Congress is an exercise of its constitutional power 'To lay and collect Taxes.' Article 1, § 8 of the Constitution. United States v. Snyder, 149 U.S. 210, 13 S.Ct. 846, 37 L.Ed. 705." Michigan v. United States, 1943, 317 U.S. 338, 340, 63 S.Ct. 302, 303, 87 L.Ed. 312, 314. The tax lien is usually attached to the property of the taxpayer though it is not extinguished simply by the transfer of the property. United States v. Bess, 1958, 357 U.S. 51, 57, 78 S.Ct. 1054, 2 L.Ed.2d 1135, 1142. Where, however, a bank has issued a money order, a very particular type of negotiable instrument whose use is controlled by a specific body of law, which is subsequently tendered for taxes, we see nothing unusual or impermissible in a decision to attach the lien to the bank's assets in the event the money order is not duly honored. This is no more than a decision to trace the taxpayer's assets. If the bank does not receive the consideration promised for the money orders, it has all the protections supplied by the law relating to negotiable

[20] The district court apparently did not pass on this argument; appellant, however, did raise it, albeit somewhat cursorily, in both its trial brief and its oral argument to the trial judge. Thus the question is properly before us.

instruments. The bank can really expect no more when it chooses to deal in negotiable instruments. In short, as applied to the facts of this case, § 6311 is a constitutional exercise of Congress' authority, the wisdom of which as a matter of federal tax policy is beyond our authority to judge. Glass City Bank v. United States, 1945, 326 U.S. 265, 268, 66 S.Ct. 108, 110, 90 L.Ed. 56, 59.

III. HOLDER IN DUE COURSE

Bank next argues that even granting a broad interpretation of § 6311 it had a legal right to refuse payment on these particular money orders. Since it is not, therefore, liable to the United States on the basis of the unpaid money orders, the bank continues, the United States should not be able to claim the existence of the statutory lien. This argument requires us to turn to Florida law and the provisions of the Uniform Commercial Code, which became effective in Florida on January 1, 1967, prior to the transactions here at issue.

[10] The keystone of the bank's argument is that the United States possessed the money orders as a simple holder, rather than as a holder in due course. Section 3-305 of the UCC provides that a holder in due course takes an instrument free from:

> (1) All claims to it on the part of any person; and
>
> (2) All defenses of any party to the instrument with whom the holder has not dealt except:
>
> > (a) Infancy, to the extent that it is a defense to a simple contract; and
> >
> > (b) Such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and
> >
> > (c) Such misrepresentation as has induced the party to sign the instrument with neither

> knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
>
> (d) Discharge in insolvency proceedings; and
>
> (e) Any other discharge of which the holder has notice when he takes the instrument.

Fla.Stat.Ann. § 673.3-305. A simple holder, by contrast, takes an instrument subject to all defenses of any party which would be available in an action on a simple contract, as well as the defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose. *Id.* § 673.3-306. Since the principal defense to liability raised by the bank—failure of consideration resulting from Hannon's action in stopping payment on its check for the money orders—[21] is unavailable against the IRS if it is a holder in due course, the bank can prevail only if the United States enjoys the less exalted status of mere holder.

A substantial hurdle blocks the bank's path to success in this Court. The district court explicitly found that the United States is a holder in due course of the 190 money orders. The government insists that this holding is a finding of ultimate fact, resting on certain implicit subsidiary findings of fact, and that our review is limited by the clearly erroneous rule, Fed.R.Civ. Pro. 52(a). *See* Humphrey v. Southwestern Portland Cement Co., 5 Cir. 1974, 488 F.2d 691, 694. The bank, on the other hand, characterizes the court's conclusion as a mixed question of fact and law and urges us to re-examine it free from the insulation of Rule 52(a). *See* Galena Oaks Corp. v.

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[21] The bank also appears to suggest the possibility of misrepresentation on the part of Medallion that the second series of money orders would be paid to the electricians. This defense, too, would be unavailable against a holder in due course.

Scofield, 5 Cir. 1954, 218 F.2d 217; 9 C. Wright & A. Miller, Federal Practice and Procedure § 2589.

[11] Section 3-301(2) of the UCC supplies the definition of a holder in due course: a holder in due course is a holder who takes an instrument for value, in good faith, and without notice that it is overdue or has been dishonored or of any defense against it on the part of any person. Fla.Stat.Ann. § 673.3-302(1). While the Code also provides statutory meaning for the terms "taking for value," *id.* § 673.3-303, and "notice to purchase," *id.* § 673.3-304, it is apparent that the application of these subsidiary definitions in order to determine whether a party is a holder in due course will very often turn heavily on the facts of a particular case. This is not to deny that a conclusion that a party is a holder in due course might depend largely or entirely on a question of law, which would of course come to us free of the "buckler and shield" of Rule 52(a). When, as in the case at bar, however, the determination was essentially factual, it should not be reversed unless clearly erroneous. Bowling Green, Inc. v. State Street Bank and Trust Co., 1 Cir. 1970, 425 F.2d 81, 85; Blow v. Ammerman, 1965, 121 U.S.App.D.C. 351, 350 F.2d 729, 731; Walsh v. Lockart Associates, 5 Cir. 1964, 339 F.2d 417; *accord,* Sample v. Wilson, 1931, 101 Fla. 818, 134 So. 549 (on rehearing), rev'g 101 Fla. 818, 139 So. 144; Baum v. Spector, Fla.Ct.App. 1968, 211 So.2d 228; *see* Commissioner v. Duberstein, 1960, 363 U.S. 278, 289, 80 S.Ct. 1190, 1198, 4 L.Ed.2d 1218, 1227; *cf.* In Re Pennyrich International, Inc., 5 Cir. 1973, 473 F.2d 417, 421 n. 4; Lupre v. Gaubert Industries, Inc., 5 Cir. 1968, 403 F.2d 207.

[12, 13] The bank argues that the evidence in the case will not support the trial court's implicit finding that the United States received the money orders in good

faith, as required of a holder in due course.[22] The bank also disputes the trial court's implicit finding that the United States did not have notice of a claim or defense to the money orders. While we concede that certain evidence supports the bank's defensive theories, two principles must guide our evaluation of appellant's challenge to the trial court's findings. First, "when district court findings of fact are challenged '[t]he question is not simply whether the reviewing court would have found otherwise but whether the trial court could permissibly find as it did.' Movible Offshore, Inc. v. The M/V Wilken A. Falgout, 5 Cir. 1973, 471 F.2d 268, 271." Guardian Life Insurance Co. v. Eagle, 5 Cir. 1973, 484 F.2d 382, 384. Secondly, "[i]n determining whether a finding is clearly erroneous the rule requires that due regard be given to the opportunity of the trial court to judge the credibility of the witnesses." 9 C. Wright & A. Miller, *supra*, § 2585 at 732; *accord*, United States v. Reddoch, 5 Cir. 1972, 467 F.2d 897, 898.

[14-16] On the basis of our careful review of the record as a whole, we find more than ample evidence to support the trial court's findings.[23] Because we are not "left with the definite and firm conviction that a mistake has been committed," United States v. United States

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[22] Bank argues, for example, that the IRS agents engaged in conduct that effectively amounted to deliberate deception of the bank by inducing, instructing, or requiring Medallion to use the money orders for taxes (knowing that the bank had issued them for payroll. Bank also argues that the United States demonstrated its bad faith by proceeding against the bank rather than by immediately levying on Medallion's account or attempting to collect the withholding taxes from Hannon pursuant to 26 U.S.C. §§ 3505, 6672.

[23] It is settled by the terms of the UCC that a payee, such as the United States in this case, may be a holder in due course. Fla. Stat. Ann. § 673.3-302(2); Exchange Nat. Bank v. Beshara, Fla. Ct. App. 1970, 236 So.2d 198, 200.

Gypsum Co., 1948, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, we must reject appellant's argument that the United States was not a holder in due course.[24]

IV. EQUITABLE CONSIDERATIONS

As an alternative ground for relief, appellant notes the essentially equitable nature of an action to foreclose a lien and insists that dirt on the hands of the IRS agents should have made the United States an unwelcome supplicant in the equity courtroom. Conceding the absence of actionable fraud, bank nevertheless argues that "*at the very least*, the conduct of [the United States'] agents in procuring and seeking to enforce such alleged lien did . . . amount to 'over-reaching,' and 'unconscionable,' 'oppressive,' and 'concealed important facts,' even if such actions by plaintiff's agents were 'strictly within the law.'" Brief for Appellant at 21 (emphasis in the original).

[17-19] Certainly when seeking an equitable remedy the United States is no more immune to the general principles of equity than any other litigant. Although these principles "will not be applied to frustrate the purpose of its laws or to thwart public policy," *see* Pan American Petroleum & Transport Co. v. United States, 1927, 273 U.S. 456, 506, 47 S.Ct. 416, 424, 71 L.Ed. 734, 747; Deseret Apartments v. United States, 10 Cir. 1957, 250 F.2d 457, 458, in general "there is no authority by which equity can come to the aid of an illegal and fraudulent scheme, regardless of the beneficence of the ultimate purpose. In re Mutual Leasing Corp., 5 Cir. 1971, 449 F.2d 811, 815. On the other hand, "unless the Government did something which in good conscience it

[24] The Government argues that under the UCC the bank lacked the right to stop payment on the money orders. We pretermit consideration of this argument as unnecessary to our disposition of the case.

should not have done, or failed to do something fair dealing required it to do, it comes into court with clean hands and is entitled to the equitable relief it obtained." *Deseret Apartments, supra*, 250 F.2d at 458.

[20, 21] The conduct of the IRS agents obviously disturbed the trial judge: "You keep talking about a moral issue, and to be perfectly frank with you, I don't find it a very pleasing thing that the government did here, my government, frankly . . . ." App. at 209. He nevertheless correctly perceived the real issue to be whether the government, through the IRS agent, had a lawful right to do what it did; that is, receive the money orders in payment of taxes and request that the bank honor them. Having determined that the United States acted with sufficient good faith and in ignorance of the bank's defenses to the money orders to attain the status of holder in due course, the court not surprisingly concluded that the United States was entitled to have its statutory lien enforced. On the basis of the evidence in this case we are unwilling to quarrel with the trial judge's belief that conduct insufficiently malignant to deprive a party of holder in due course status is likewise an inadequate reason for refusing to grant an equitable remedy. Whether the contamination of one seeking equity justifies the chancelor in turning a deaf ear is, in the first instance, for the chancellor to decide; we see nothing in the conduct of the IRS agents that should have compelled him to call the men pariahs.[25]

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[25] On an alternate tack bank suggests that this case is an example of a situation in which a party should not be allowed to be in effect a third-party beneficiary of one party's fraud on another. The district court obviously did not accept this theory and we see no reason to disturb that conclusion.

V. COUNTER CLAIM

[22] Finally, appellant protests the district court's rejection of its Federal Tort Claims Act counterclaim.[26] According to bank's theory of liability, the IRS agents negligently omitted to notify the bank that the money orders would not be used to pay the electricians, but rather had been tendered in payment for Medallion's taxes. The bank suggests that had it been so notified, in timely fashion, it could have notified Hannon, which in turn could have paid the electricians in time to avoid the late payment penalty for which bank was subsequently assessed in state court.

The district court recognized that a private party would be liable for a failure to notify another only if an underlying duty to notify existed between the two parties. *E.g.*, Modlin v. City of Miami Beach, Fla. 1967, 201 So. 2d 70, 75. Concluding that the IRS had no such duty to give notice to the bank of the delivery of the money orders, the court could find no basis for imposing liability on the United States. We detect no error in this reasoning. The fact of being a holder in due course of the money orders certainly created no legal duty on the part of the United States to notify the bank. Nor can we find the basis for such a duty in the statement from Hatahley v. United States, 1956, 351 U.S. 173, 181, 76 S.Ct. 745, 752, 100 L.Ed. 1065, 1074, relied on by appellant that "'[d]ue care' implies at least some minimal concern for the rights of others." The words "due care" point to the issue of

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[26] 28 U.S.C. § 1346(b) grants to federal district courts exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

whether a party's conduct complies with or violates a duty owned to another; they provide no independent answer to the preliminary question whether a duty exists at all.[27] Having failed to supply an affirmative answer to that initial question, the bank was not entitled to proceed with its claim.[28]

VI. CONCLUSION

This case has required us to explore one of the lesser known chambers in a labyrinthine Internal Revenue Code honeycombed with obscure passageways. But if unfamiliar and infrequently visited, section 6311(b)(2) may be

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[27] In *Hatahley* government agents acting pursuant to the Federal Range Code had impounded Navajo livestock unlawfully grazing on federal lands, and the Indians had filed suit against the United States under the Tort Claims Act. Since the agents had failed to comply with notice provisions of the Federal Range Code, they were found to have been trespassers whose conduct entitled the plaintiffs to recover money damages. Whether the agents' acts were, in the operative words of 28 U.S.C. § 1346(b), "negligent" or "wrongful," the crucial measure of their conduct came from the statutory duty to give notice. In the case *sub judice*, by contrast, the IRS agents were subject to no such statutory command.

In addition, as both the court below and the United States have suggested, the *Hatahley* Court made the statement cited by appellant in the course of holding inapplicable a statutory provision excepting from § 1346(b) "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . ." 28 U.S.C. § 2680(a). For reasons not entirely clear to us, the government insists that the applicability of this exception is not an issue in the case at bar. Since our disposition of appellant's counterclaim argument need not turn on the issue, we omit further discussion of the point.

[28] The government argues that in any event the district court lacked jurisdiction to entertain the bank's counterclaim because it is a "claim arising in respect of the assessment or collection of any tax," specifically excluded from the provisions of § 1346(b) by 28 U.S.C. § 2680(c). The bank, of course, disagrees, emphasizing that its counterclaim rests not on the conduct of the IRS agents in collecting the money orders from Medallion, but rather on the independent, separate omission relating to the bank. We need not resolve this particular dispute, and decline to do so.

understood without the specialized tools of statutory speology. Framed in relatively straightforward English, its meaning is readily apparent; and though the unwary may find it a trap, passage around the danger is marked by accepted commercial practices and established principles of the law of negotiable instruments. Our federal tax code may appear to operate with a rigidity that makes its collectors bereft of human pity, conscience, or compassion; its operation is also an illustration that ours is a government of laws, not men.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-2586

D.C. Docket No. CA 72-24

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SECOND NATIONAL BANK OF NORTH MIAMI,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before WISDOM and GOLDBERG, Circuit Judges, and LYNNE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

October 4, 1974

Issued as Mandate: Nov. 8, 1974.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2586

[Filed U.S. Court of Appeals, Oct. 31, 1974, Edward W. Wadsworth, Clerk]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SECOND NATIONAL BANK OF NORTH MIAMI,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

(October 31, 1974)

Before WISDOM and GOLDBERG, Circuit Judges and LYNNE, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2586

[Filed U.S. Court of Appeals, Dec. 4, '74,
Edward W. Wadsworth, Clerk]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SECOND NATIONAL BANK OF NORTH MIAMI,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ORDER:

ON CONSIDERATION OF THE MOTION of appellant for recall and stay of judgment issued as mandate in the above numbered and entitled cause, pending an application for a writ of certiorari to the Supreme Court of the United States,

IT IS ORDERED that the judgment issued as mandate, be recalled and stayed to and including January 29, 1975, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within said period there shall be filed with the Clerk of this

Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ [Illegible]
United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

December 4, 1974

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

TO ALL COUNSEL AND THE DISTRICT CLERK:

No. 73-2586

U.S.A.

vs.

SECOND NATIONAL BANK OF NORTH MIAMI

(D.C. No. CA 72-24)

MANDATE RECALLED AND STAYED TO AND INCLUDING JANUARY 29, 1975

(SEE ORDER ENCLOSED)

Gentlemen:

The court has this day granted the recall and stay of the mandate to the date shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for a writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for a writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection

with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

By copy of this letter to the clerk of the District Court, we request that he return the opinion and judgment issued as mandate on November 8, 1974.

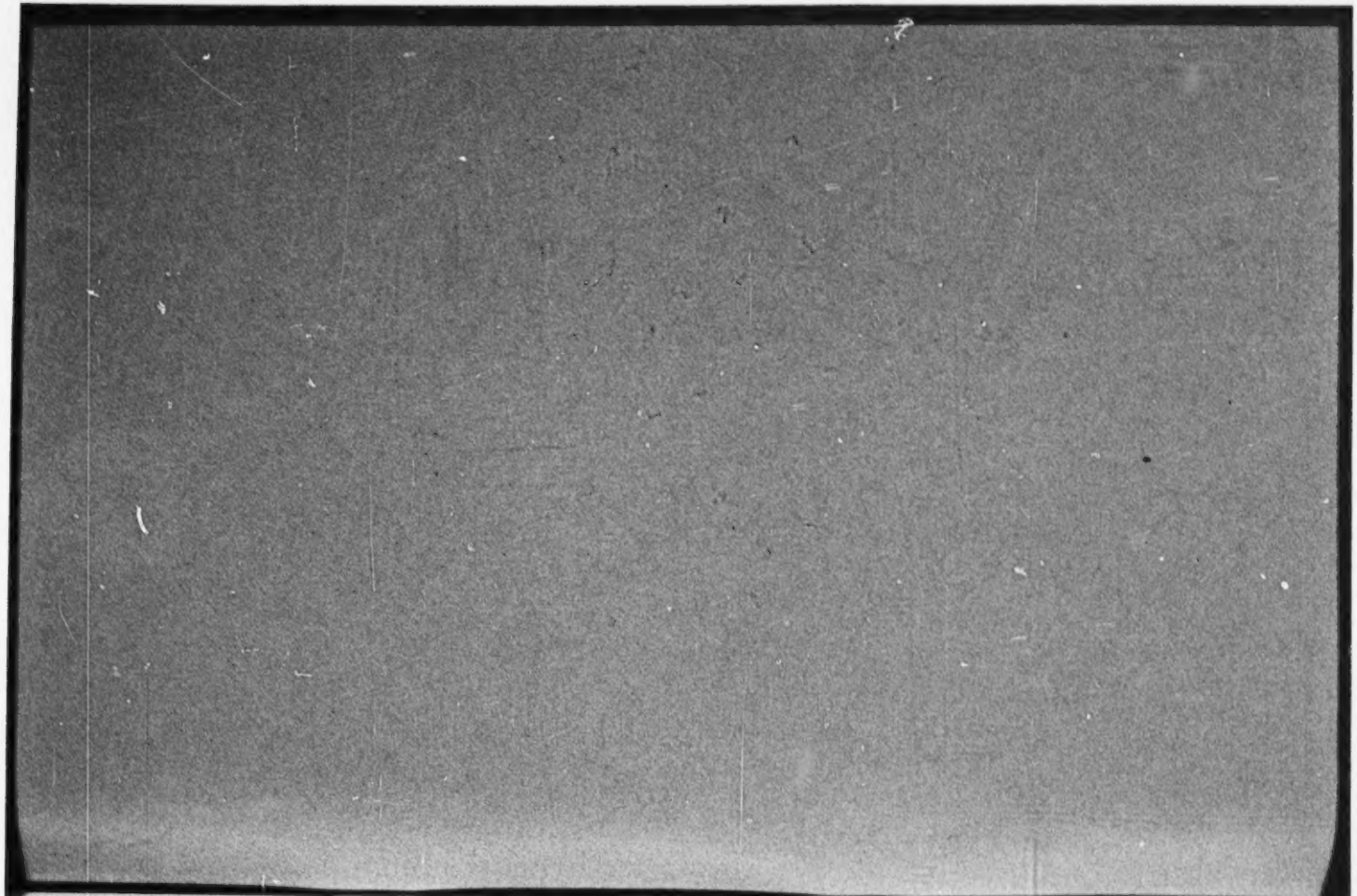
Very truly yours,

EDWARD W. WADSWORTH
Clerk

By /s/ [Illegible]
Deputy Clerk

enc.

cc Mr. Sheldon Rosenberg
Messrs. Robert W. Rust
Melvyn L. Ames
Messrs. Scott P. Crampton
Meyer Rothwacks
Bennet N. Hollander
Arthur L. Bailey
Mr. Robert E. Noel
Mr. Joseph I. Bogart, Clerk



In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-933

SECOND NATIONAL BANK OF NORTH MIAMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a commercial bank, issued money orders to one of its customers, which in turn delivered them to the Internal Revenue Service in payment of its employment taxes. Thereafter, petitioner refused to honor the money orders when presented for payment. The sole issue raised by the petition is whether the decision below correctly held that the government was a holder in due course with respect to the money orders under Florida law and that the Internal Revenue Service properly imposed a lien on petitioner's assets in the amount of the unpaid money orders, pursuant to Section 6311(b)(2) of the Internal Revenue Code of 1954.

On October 14, 1970, petitioner issued 190 blank-payee money orders totalling $92,355,86 to one of its customers, Medallion Electric Company, Inc., an electrical subcontractor which was working under the Hannan Company, a general contractor, in the construction of a shopping

center. The money orders had been issued to Medallion after a deposit to its payroll account of a check drawn by Hannan payable to Medallion and petitioner. However, instead of meeting its payroll with the money orders, Medallion delivered the money orders to the Internal Revenue Service in payment of its employment taxes. Subsequently, when Hannan learned that Medallion's emloyees had not been paid with the money orders, Hannan stopped payment on its check. When the money orders were presented for payment by the Internal Revenue Service, petitioner refused to honor them. The United States thereafter brought this suit to collect the amount of the money orders and to secure enforcement of a lien on petitioner's assets to protect its right to payment from petitioner (Pet. App. 10a-13a).

The district court concluded that under Florida law the United States was a holder in due course with respect to the money orders and thereby rejected petitioner's claimed defenses of failure of consideration and misrepresentation by Medallion. The district court also enforced the lien on petitioner's assets imposed by Section 6311(b)(2) of the Internal Revenue Code of 1954. The court of appeals affirmed (Pet. App. 5a-35a).

1. Section 6311(a) of the Internal Revenue Code of 1954 provides that it shall be lawful for the Internal Revenue Service to receive checks in payment of taxes. However, in the event a certified check or any money order used in payment of taxes is not paid by the drawee bank, Section 6311(b)(2) grants the United States, in addition to its right to obtain payment from the taxpayer, a lien for the amount of the check or money order upon all the assets of the drawee bank.

As the court of appeals pointed out (Pet. App. 27a-31a), petitioner had no right to refuse payment on the money orders, because the United States was a holder in

due course with respect to them under Florida law.[1] In so concluding, that court held that there was ample evidence to support the factual findings made by the district court that petitioner's defenses of failure of consideration and fraud by Medallion or the United States were without merit.

Nevertheless, petitioner again challenges (Pet. 14-18) the correctness of those findings.[2] In its view, there was a failure of consideration when Hannan stopped payment on its check to Medallion upon the strength of which petitioner issued its money orders. However, at the time the United States received the money orders, it had no notice of Hannan's stop payment order because Hannan did not stop payment on its check until after the money orders were delivered to the Internal Revenue Service. Moreover, there is no evidence showing that the Internal Revenue Service agents knew that the money orders had been issued by petitioner prior to collection of Hannan's check. Indeed, as petitioner acknowl-

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[1]Section 673.3-302 of the Uniform Commercial Code, Fla. Stat. Ann., defines a holder in due course as follows:

Holder in due course:

(1) A holder in due course is a holder who takes the instrument:

(a) For value; and
(b) In good faith; and
(c) Without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

* * * * *

[2]Contrary to petitioner's contention (Pet. 14-15), the court of appeals did not treat the district court's determination that the United States was a "holder in due course " as a purely factual matter, but, instead, noted the mixed legal and factual questions generally involved in such an issue (Pet. App. 29a). However, here only factual issues relating to notice and good faith were raised by petitioner (Pet. App. 27a-31a), to which the court of appeals properly applied the "clearly erroneous" standard of review of Rule 52(a) of the Federal Rules of Civil Procedure.

edged below (I-R. 186-187),[3] it is the custom in the banking trade not to issue money orders on uncollected funds. Finally, even if the revenue agents knew that petitioner issued the money orders on uncollected funds, they had no reason to believe the delivery of the money orders to the Internal Revenue Service would result in Hannan's stopping payment on its check since Medallion's representative informed them that the funds received from Hannan represented amounts due Medallion on accounts receivable and did not represent advances for payroll purposes (I-R. 129, 135).

Similarly, petitioner's contention (Pet. 18-20) that the Internal Revenue Service "called upon" and "directed" Medallion to "procure" the money orders by "deceit" and to deliver them to the Internal Revenue Service is without merit. The evidence showed that Medallion initiated the meeting at which time it indicated to the Internal Revenue Service it was having trouble meeting its employment tax obligations, and that it was Medallion itself that suggested using the money orders to pay its taxes (I-R. 136, 151). The record does not support petitioner's contention that the United States directed a plan to defraud petitioner.[4]

2. Petitioner further argues (Pet. 21-23) that the courts below erred in enforcing a lien on all of its assets in the amount of the unpaid money orders pursuant to Section 6311(b)(2) of the Code. Contrary to petitioner's repeated allegations of fraud on the part of

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[3]"I-R. refers to Volume One of the record appendix filed in the court of appeals.

[4]Contrary to petitioner's contention (Pet. 19), an absence of good faith cannot be inferred from the fact that Medallion used the money orders to pay its withholding taxes rather than its employees. Withheld taxes are held by the employer as a special fund in trust for the United States and may not be used for other corporate purposes including the payment of employee salaries. See 26 U.S.C. 7501; *Liddon* v. *United States*, 448 F. 2d 509, 513 (C.A.5), certiorari denied, 406 U.S. 918.

Medallion and the Internal Revenue Service, the lien provisions of Section 6311(b)(2) have been applied here for the sole purpose of protecting the rights of the United States and enforcing the otherwise existing obligation of petitioner to pay to a holder in due course the face amount of money orders it issued. Although petitioner is not the taxpayer, the lien exists against its assets because the money orders it issued represent an independent and unconditional obligation of the bank. *State of Pa.* v. *Curtiss Nat. Bank of Miami Springs, Fla.*, 427 F.2d 395 (C.A. 5); *United States* v. *Milton*, 382 F.2d 976 (C.A. 6), certiorari denied, 390 U.S. 952. In effect, the holder of a bank's money orders, the United States in this case, becomes a creditor of the bank and the lien imposed by Section 6311(b)(2) merely serves to protect this interest.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.